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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1963

No. _____

TERRY & WRIGHT, INC. and
FEDERAL INSURANCE COMPANY, - - - *Petitioners,*

v.

HUGH D. BLANCHARD and CULLEN JENKINS, d b a Blanchard & Jenkins Construction Company, - - - - - - *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Petitioners pray that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above entitled case on May 11, 1964.

CITATIONS TO OPINIONS BELOW.

The Memorandum and Order of the District Court is unreported and is printed in the Appendix hereto, pages 35-40, and contained in the Certified Record, pages 38a-43a. The Opinion of the Circuit Court of

Appeals is printed in the Appendix, pages 41-45, and is unreported at this time. The Opinion of the Circuit Court of Appeals may also be found at the end of the Certified Record.

GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED.

The judgment of the Circuit Court of Appeals was entered on May 11, 1964 (rear of Certified Record, Appendix, page 46). The jurisdiction of this Court is invoked under 28 USCA 1254. Certiorari is sought because the question of federal law involved concerns a serious matter involving the construction of the Federal Rules of Civil Procedure and the Federal Statutes concerning the power of a District Court to amend a Complaint after judgment and after time for appeal has expired. Certiorari is also sought because the question of finality of judgments in the United States District Courts under Rule 60 (b) (4), Federal Rules of Civil Procedure, should be settled. In addition, the holdings of the District Court and the Circuit Court of Appeals are in conflict with the holding of this Court in *American Fire & Casualty Company* v. *Finn*, 341 U. S. 6, 95 L. Ed. 702, 71 S. Ct. 534, and *Barnard-Curtiss Co.* v. *U. S.* (C. A. 10th), 252 F. 2d 94, in that it gives to the District Court a wrongful extension of federal jurisdiction denied to it by Congress.

QUESTIONS PRESENTED FOR REVIEW.

1. When the plaintiffs, Blanchard and Jenkins, who were Kentucky citizens, did not allege that the principal place of business of the defendants, Terry & Wright and Federal Insurance Company, was not in Kentucky, and plaintiffs did not allege the necessary allegations under 40 USCA 270 a, 270 b (a, b), 270 c concerning the Miller Act, and it was proven, after jurisdiction being placed in issue by the Answer, that the principal place of business of one defendant was in Kentucky, did the District Court have jurisdiction on the basis of diversity of citizenship?

2. Since judgment had been rendered and time for appeal had lapsed, the judgment thereby became a final judgment, and did said final judgment terminate the jurisdiction of the District Court to permit the filing of a Third Amended Complaint presenting issues under the Miller Act that were not tried out or put in issue previously?

3. Should Rule 60, Federal Rules of Civil Procedure, be so construed as to permit the filing by the District Court of a Third Amended Complaint after final judgment, and after the District Court had lost jurisdiction except for the purposes set forth in Rule 60?

4. Does 28 USCA 1653 authorize the filing of the Third Amended Complaint after final judgment and after the District Court has lost jurisdiction?

5. Did the District Court properly allow the filing of the Third Amended Complaint when it added a new party plaintiff and when it failed to allege, pursuant to 40 USCA 270 b (b) that the suit had been commenced within one year after the final settlement of the contract obligations between Terry & Wright and the United States engineers?

STATUTES INVOLVED.

The statutory provisions involved are *28 USCA* 1332 which is printed in Reasons for Granting the Writ, pages 11-12; *Rule 15(a) and (b)* and *Rule 60, Federal Rules of Civil Procedure* printed in the Appendix, pages 50-52; *28 USCA* 1653 printed in the Reasons for Granting the Writ, page 26; *40 USCA 270 b (b)*, printed in the Reasons for Granting the Writ, page 29; *40 USCA 270 a, 270 b (a), 270-c*; *28 USCA 2107*; *28 USCA 452* all printed in the Appendix on pages 47-50.

STATEMENT OF THE CASE.

The plaintiffs in this action filed the Complaint against the defendants, Terry & Wright, Inc. and Federal Insurance Company on December 11, 1959 (1a). Jurisdiction of the District Court was alleged to be on the basis of diversity of citizenship (10a-11a) pursuant to the provisions of *28 USCA* 1332. The Complaint alleged (10a), as to jurisdiction, the following:

> "1. Plaintiffs are citizens and residents of the State of Kentucky. The defendant, TERRY & WRIGHT, INC., is a corporation created and existing under the laws of the State of Michigan and is a citizen and resident of said State. The Defendant, FEDERAL INSURANCE COMPANY, is a corporation created and existing under the laws of the State of New York and is a citizen and resident of said State.
>
> "2. The matter in controversy exceeds the sum of TEN THOUSAND DOLLARS ($10,000), exclusive of interests and costs."

The Complaint went on further to allege that the defendant, Terry & Wright, had agreed to construct a dam and spillway at the Rough River Reservoir in Grayson County, Kentucky, for the United States of America, and that the Federal Insurance Company had executed, as surety, a bond to the United States of America guaranteeing the performance of the contract by Terry & Wright and the prompt payment by Terry & Wright of all claims for labor and material used in the performance of the contract (11a). The Complaint further alleged that the plaintiffs furnished filter material to Terry & Wright as well as certain machinery and equipment together with personnel to operate same, and demanded judgment against Terry & Wright and the Federal Insurance Co., and each of them, in the sum of $47,764.90 plus $3,415.21 together with interest (11a-12a).

On January 2, 1960 (13a), the defendants filed their Answer and Counterclaim and moved to dismiss the Complaint for lack of jurisdiction, as follows (13a):

> "1. Terry & Wright, Inc., moves the Court to dismiss plaintiffs' complaint because it does not state a cause of action on which relief may be granted and because this Court has no jurisdiction of this cause of action."

The Opinion of the Circuit Court, wherein it states on page 42, "In this motion to vacate defendants asserted for the first time that the principal place of business of the contractor was Kentucky, which was the plaintiffs' place of residence: . . . " is not cor-

rect because lack of jurisdiction was asserted in the Answer.

In addition, the defendants admitted the allegations of paragraphs 1, 2, 3, 4 and 5 of the Complaint and denied every other allegation therein (13a). In addition, accord and satisfaction (13a) by means of a release and payment, were set forth in the affirmative (13a-14a). The defendant, Terry & Wright, filed its Counterclaim alleging failure on behalf of the plaintiff to furnish the materials required under the contract and seeking damages in the amount of $63,776.24 due to the plaintiffs' failure (15a).

On July 9, 1960 (16a) the plaintiffs filed a reply to Terry & Wright's Counterclaim denying the allegations of the Counterclaim while admitting the basic contract between Terry & Wright and Blanchard & Jenkins Construction Company (16a).

In the summer of 1960, August 18, 1960 (17a), the plaintiffs moved to amend their Complaint, which Motion was sustained setting forth additional alleged breaches of contract as to Terry & Wright and seeking additional damages (19a).

On November 24, 1961, the defendants filed an Amended Answer in response to the Amended Complaint (20a-21a) pleading accord and satisfaction and a general denial. On November 19, 1962, plaintiffs filed an Amended Reply to the Counterclaim setting forth estoppel (22a).

This case was the first assigned for trial on May 16, 1960 (3a). However, on May 9, 1960 (3a) the case was taken from the trial docket. A pre-trial conference

had been held initially on this action on February 25, 1960 (2a).

On September 13, 1960, the case was assigned for a pre-trial conference on September 26, 1960 (3a) which was continued to September 28, 1960 (4a), wherein the case was assigned for trial for November 9, 1960 (4a). However, the case was not tried on that date.

On February 10, 1961, the case was assigned for a pre-trial conference on February 23, 1961 (4a). However, the pre-trial conference was cancelled and the case continued generally on the docket (4a). On September 26, 1961, a pre-trial Order was entered assigning the case to November 30, 1961 for trial (4a). However, the case was not tried at that date, but set down on terms (4a).

Another pre-trial conference was had on the case on February 19, 1962 and the case was assigned for trial on May 1, 1962 (15a). The case was removed from the trial docket and reassigned for a jury trial on May 29, 1962 (5a).

By agreement of the parties, the case was taken from the trial docket and was not tried on May 29, 1962, but the case was reassigned on September 25, 1962 for a jury trial November 19, 1962 (5a).

This action came on for trial November 19, 1962 (24a) in which a jury was empaneled and on November 21, 1962 returned a verdict in favor of the plaintiffs in the amount of $17,899.92 (26a).

On November 21, 1962 the plaintiffs moved and secured an Order authorizing them to file their Second

Amended Complaint to conform to the evidence (23a) pleading a new contract or novation and seeking additional damages.

On November 23, 1962 Judgment was entered against the defendants based upon the verdict (26a). On November 29, 1962 (27a) defendants moved to set aside the verdict and to enter judgment for the defendants' notwithstanding the verdict. On March 6, 1963 (30a) this Motion was overruled by the Trial Court.

On March 9, 1963 (31a) the defendants served notice that they would move the Court to dismiss the action because of lack of jurisdiction on March 15, 1963. On March 15, 1963, the Motion of the defendants (31a) was filed moving to dismiss the case because of lack of jurisdiction in that there was no jurisdiction alleged in the Complaint and lack of jurisdiction was affirmatively proved during the trial.

In support of the Motion, defendants filed excerpts of testimony taken during the trial of Mr. L. H. Terry wherein he testified (32a-33a) that he was President and General Manager of Terry & Wright. He further stated without contradiction that Terry & Wright is incorporated in the State of Michigan and that its principal office or place of business is on Poplar Level Road in Louisville, Kentucky. The principal office and place of business has been located in Louisville, Kentucky for nine or ten years, and for the last nine or ten years, Terry & Wright has not done any business in Michigan (33a). All of Terry & Wright's business has been conducted from its Louisville office (33a).

On April 10, 1963 (8a, 35a) the plaintiffs moved to file their Third Amended Complaint and tendered said Third Amended Complaint (36a). The matter came on for argument before the Trial Court on April 12, 1963 (8a, 34a) and the Court heard argument but requested briefs from the parties. The Third Amended Complaint (36a) purported to amend the Complaint to one under the Miller Act, more properly stated under 40 U.S.C. 270 A, 270 B, 270 C. It was then sought to change the title of the case so that it would read the United States of America for the use and benefit of Blanchard & Jenkins as required under 40 U.S.C. 270 B (b) (36a). Allegations were also made concerning the Federal Insurance Company as to the bond required under the Miller Act by 40 U.S.C. 270 (a) (36a). In addition, there was alleged that the plaintiffs were not paid in full prior to the expiration of a period of ninety days after the day on which the last of the labor and materials were furnished and supplied defendants for which this claim is made (36a) and further alleged (37a) that the date of the final settlement of the contract between the plaintiffs and Terry Wright, Inc. was not more than one year prior to December 11, 1959, the original commencement date of these proceedings (37a).

The Circuit Court, in its Opinion at page 43, stated that the Third Amended Complaint ". . . did not change in any respect the substantive allegations setting forth plaintiffs' claim." As shown above, this is not accurate because a new party plaintiff was added and

in addition allegations concerning payment and settlement were made, which were not previously in issue.

On June 17, 1963 (37a), the Trial Court entered its Memorandum and Order overruling the defendants' motion to dismiss for want of jurisdiction, sustaining the Motion of plaintiffs to file their Third Amended Complaint (37a-43a).

From the Order dated June 14, 1963, and entered June 17, 1963, refusing to set aside the Judgment as void and permitting the filing of the Third Amended Complaint after Judgment, the defendants filed a Notice of Appeal (43a), and executed a supersedeas bond (45a).

On May 11, 1964, the United States Court of Appeals for the Sixth Circuit entered its Opinion and on the same date entered its judgment (see Certified Record and Appendix, pages 41-45). The Opinion misstates the facts in that it ignores the fact that the issue of jurisdiction was raised in the Answer filed by the defendants (13a); misstates the facts as to the Third Amended Complaint failing to present new issues; ignores the requirements of *40 USCA* 270 a, b and c as to the necessary allegations to assert jurisdiction and a valid complaint under the Miller Act; and extended the jurisdiction of the District Court beyond the limits given to said Court by Congress in permitting this Amended Complaint to be filed presenting issues not tried and ignoring the fact of the finality of the judgment contrary to the provisions of *American Fire & Casualty Company* v. *Finn, supra.*

REASONS FOR GRANTING THE WRIT.

1. When the plaintiffs, Blanchard and Jenkins, who were Kentucky citizens, did not allege that the principal place of business of the defendants, Terry & Wright and Federal Insurance Company, was not in Kentucky, and plaintiffs did not allege the necessary allegations under 40 USCA 270 a, 270 b (a, b), 270 c concerning the Miller Act, and it was proven, after jurisdiction being placed in issue by the Answer, that the principal place of business of one defendant was in Kentucky, did the District Court have jurisdiction on the basis of diversity of citizenship?

The Complaint in this action was filed on December 11, 1959 and it was alleged (10a-11a) that the defendant, Terry & Wright, Inc., is a corporation created and existing under the laws of the State of Michigan and is a citizen and resident of that State. It was further alleged that the Federal Insurance Company is a corporation created and existing under the laws of the State of New York and is a citizen and resident of that State. The defendant, in its Answer, alleged that there was no jurisdiction in the Court of this cause of action (13a) and proved by evidence (32a-33a), that while Terry & Wright was incorporated in Michigan its principal place of business was in Louisville, Kentucky, and it had not done any business in Michigan for nine or ten years.

28 USCA 1332 provides as follows:

> "(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—

(1) citizens of different States;
(2) citizens of a State, and foreign states or citizens or subjects thereof; and
(3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

"(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any set off or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

"(c) For the purposes of this section and section 1441 of this title, a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business.

"(d) The word 'States', as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico."

As indicated in the caption to the Complaint (10a), the plaintiffs, Hugh D. Blanchard and Cullen Jenkins, d b a Blanchard & Jenkins Construction Company, are citizens of Kentucky (10a). Thus, it was established there was clearly no diversity of citizenship between the plaintiffs and defendant, Terry & Wright as required by 28 USCA 1332 since the principal place

of business of Terry & Wright, Inc. was in Kentucky and the plaintiffs were citizens of Kentucky.

The Complaint having failed to allege that the Federal Insurance Company did not have its principal place of business in the State of Kentucky, and no proof having been offered on the subject to substantiate the jurisdiction, there was a presumption that there was no diversity of citizenship as to the Federal Insurance Company. In *Bell* v. *Gray* (E.D., Ky.), 191 F. Supp. 328, 329, affirmed (C.A. 6th) 287 F. 2d 410, this rule is set forth as follows:

> "The statement of plaintiffs' counsel in his brief that this is a court of general jurisdiction should be corrected. Every federal court is a court of limited, not of general, jurisdiction. All presumptions are against the jurisdiction of such a court, so that the facts disclosing the jurisdiction must affirmatively appear upon the record. Turner v. Bank of North America, 1799, 4 Dall. 8, 1 L. Ed. 718; McNally v. Jackson, D.C., 7 F. 2d 373; Swanson v. United States, 9 Cir., 224 F. 2d 795, 15 Alaska 608. The motion to dismiss the complaint should be sustained."

Federal courts are courts of limited jurisdiction such as Congress has deemed proper to grant them under a valid statute. *Peoples Bank* v. *Calhoun*, 102 U. S. 256, 260-261, 26 L. Ed. 101, 102. Thus, the jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretation or by prior action or consent of the parties. To permit a Federal Trial Court to amend a Complaint and allow

a judgment to stand where there is no jurisdiction works a wrongful extension of federal jurisdiction and gives district court power that the Congress has denied them.

"In the present action under 28 USCA 1332 (c) to give the District Court diversity jurisdiction over an action in which there are corporate defendants, the plaintiffs must set forth affirmatively in the Complaint and must prove in the action not only the state by which the corporations were incorporated, but also state and prove where each corporation has its principal place of business. *Stenhouse* v. *Jacobson* (N.D., Calif.), 193 F. Supp. 694, 695-696; *Brandt* v. *Bay City Super Market* (N.D., Calif.), 182 F. Supp. 937, 939, 940; *Browne* v. *Hartford Fire Ins. Co.* (N.D., Ill.), 168 F. Supp. 796, 799; *Washington-East Washington Joint Authority* v. *Roberts and Schaefer Co.* (W.D., Penn.), 180 F. Supp. 15, 16-17; *Roseberry* v. *Fredell* (E.D., Ky.), 174 F. Supp. 937, 939-940; *Cherry* v. *Alcoa Steamship Co.* (D., Md.), 202 F. Supp. 663, 664; *F. & L. Drug Corp.* v. *American Central Insurance Co.* (D., Conn.), 200 F. Supp. 718, 720-721, 723-724; *Maryland Casualty Company* v. *Baker* (E.D., Ky.), 196 F. Supp. 234, 236; *Paramount Packaging Corp.* v. *H. B. Fuller Company of New Jersey* (E.D., Penn.), 190 F. Supp. 178, 179; *Wright* v. *Governor Hotel Operating Co.* (E.D., Ill.), 184 F. Supp. 156, 157; *Adams* v. *Ralph L. Smith Lumber Co.* (N.D., Calif.), 181 F. Supp. 729, 730; *Gobet* v. *International Hotels Corp.* (D., Puerto Rico), 184 F. Supp. 171, 174; *1 Moore's Federal Practice*, Sec. 0.60 (8.-4), p. 642;

see also p. 14. *1962 Supplement under page 664, note 18*; p. 11. *1962 Supplement under page 644, note 34*; *Kelly* v. *U. S. Steel Corp.* (C.A. 3rd, 1960) 284 F. 2d 850; *Gilardi* v. *Atchison, Topeka and Santa Fe Ry. Co.* (N.D., Ill.), 189 F. Supp. 82, 85; *Vol. 1A, Federal Practice & Procedure*, Barron & Holtzoff (Rules Edition), Sec. 254, p. 45; *note 705 under 28 USCA 1332*, 1963 Cumulative Annual Pocket Part, p. 190.

There can be no diversity of citizenship if the plaintiff is of the same state citizenship as any one of the defendants, since diversity must be complete. *Baltimore and Ohio R. Co.* v. *City of Parkersburg*, 268 U. S. 35, 45 S. Ct. 382, 69 L. Ed. 834; *Walker* v. *Bank of America* (C.A. 9th), 268 Fed. 16, 22. As there is no diversity here the judgment is void. *City of Indianapolis* v. *Chase National Bank*, 314 U. S. 63, 74-75, 62 S. Ct. 15, 19, 86 L. Ed. 48.

The question of federal jurisdiction of the Trial Court cannot be waived and can be reviewed at any time. *Parker* v. *Ormsby*, 141 U. S. 81, 35 L. Ed. 654, 11 S. Ct. 961; *Birmingham Post Co.* v. *Brown*, 217 F. 2d 127; *Canadian Indemnity Co.* v. *Republic Indemnity* (C.A. 9), 222 Fed. 601, 603. See also *Rader* v. *Manufacturers Casualty Ins. Co.* (C.A. 2), 242 F. 2d 419, 427; *American Fire & Casualty Company* v. *Finn*, 341 U. S. 6, 95 L. Ed. 702, 71 S. Ct. 534.

The Court of Appeals took the position that the Complaint, without any amendments, stated a cause of action under the Miller Act. This holding is clearly erroneous because first the action is not in the name of the proper party plaintiff as required by [illegible] USCA

270 b (b) in that the action is not brought in the name of the United States and the Complaint does not so allege. Moreover, this Statute requires that there must be an allegation that the suit was not commenced after the expiration of one year from the final date of the settlement of the contract. *Fleischmann Construction Co. v. United States to the use of Forsberg*, 270 U. S. 349, 358, 46 S. Ct. 284, 70 L. Ed. 624, 630. The limitation provision is a condition on the right to sue and, therefore, must appear affirmatively in the Complaint. *Baker Contract Company* v. *United States* (C.A. 4th), 204 F. 390, 397; *American Surety Company of New York* v. *Wheeling Structural Steel Company* (D.C., W. Va.), 26 F. Supp. 395, 399, reversed on other grounds 114 F. 2d 237; *United States for the use of Ross* v. *Somers Construction Company* (D.C., Del.), 184 F. Supp. 563, 566; *Antrim Lumber Company* v. *Hannan* (C.A. 8th), 18 F. 2d 548, 550; *Salyers* v. *United States* (C.A. 8th), 257 F. 2d 255, 259; *United States* v. *Merrick* (D.C., N.Y.), 215 F. 2d 256, 257. Thus, no cause of action is stated in the original complaint under the Miller Act.

The holding of the Circuit Court that the United States is merely a nominal party is contrary to this Court's finding in *United States Fidelity & Guaranty Company* v. *United States for the benefit of Kenyon*, 204 U. S. 349, 27 S. Ct. 381, 383, 51 L. Ed. 516, wherein it was held that the United States was the real party to the action as it is the principal party to the contract and the Act is for the purpose of providing that the interest of the government in construction of public

works will be subserved as contractors for such works are able to obtain materials and supplies promptly and with certainty. Thus, by the passage of the Miller Act, Congress has acted to show the importance of assuring those who furnished such materials and supplies that the government will assert its power directly for their protection. *Davidson Bros. Marble Company* v. *United States ex rel. Gibson*, 213 U. S. 10, 29 S. Ct. 329, 53 L. Ed. 675. The holding in the present case by the Sixth Circuit conflicts with the holding in *Barnard-Curtiss Company* v. *United States for the use and benefit of D. W. Falls Construction Company* (C.A. 10th), 252 F. 2d 94, 95. See also *United States for use and benefit of Browne and Bryan* v. *Massachusetts Bonding & Insurance Company* (D.C. N.Y.), 29 F.R.D. 162.

Thus, it is clear that in the Complaint as filed the allegations were not sufficient for jurisdiction under diversity of citizenship or under the Miller Act. Therefore, the Circuit Court's Opinion is erroneous in so holding and is in conflict with the Tenth Circuit's Opinion in *Barnard-Curtiss Co.* v. *United States for the use and ben't of D. W. Falls Construction Co.*, *supra*, and the Opinion of this Court as set forth in *United States Fidelity & Guaranty Co.* v. *United States for the Use of Kenyon*, *supra*. Thus, for the purpose of clarifying the status of actions under the Miller Act as well as under the statutes dealing with diversity of citizenship and in view of the conflict of decisions, certiorari should be granted.

2. Since judgment had been rendered and time for appeal had lapsed, the judgment thereby became a final judgment, and did said final judgment terminate the jurisdiction of the District Court to permit the filing of a Third Amended Complaint presenting issues under the Miller Act that were not tried out or put in issue previously?

In considering the authority of the Trial Court as to the question of whether or not the Motion made by the appellant to declare the Judgment void should have been sustained and the third amendment to the Complaint not allowed the following dates should be considered:

a. Complaint filed December 11, 1959 (10a).

b. Answer and Counterclaim filed January 20, 1960 (13a).

c. Reply filed by plaintiff January 9, 1960 (16a).

d. First Amended Complaint filed September 28, 1960 (18a).

e. Amended Answer filed November 24, 1961 (20a).

f. Amended Reply filed November 19, 1962 (22a).

g. Trial of case November 19, 20, 21, 1962 wherein verdict for plaintiff was returned (24a-25a).

h. Second Amended Complaint to conform to the evidence filed November 21, 1962 (23a).

i. Judgment entered November 23, 1962 in favor of plaintiffs, Hugh D. Blanchard and Cullen Jenkins, d b a Blanchard & Jenkins Construction Company (26a).

j. Defendant's Motion for Judgment in accordance with its Motion for Directed Verdict filed November 29, 1962 (27a).

k. Court's Order overruling defendant's Motion to set aside verdict and enter Judgment for defendant entered March 6, 1963 (30a).

l. Notice filed March 9, 1963 and Motion filed March 15, 1963 to set aside Judgment and enter Judgment for defendants, because of lack of jurisdiction (31a).

m. Filing Motion to Amend Complaint on April 10, 1963 and tendering Third Amended Complaint which was filed on June 14, 1963 (35a-36a).

The Judgment in this action was entered on November 23, 1962. Defendant's Motion for New Trial and for Judgment notwithstanding the verdict was overruled on March 6, 1963. No Notice of Appeal was filed from the Judgment entered November 23, 1962. The plaintiffs move to file their Third Amended Complaint April 10, 1963, more than thirty days after the Motion for Judgment notwithstanding the verdict was overruled. Thus, the Judgment of November 23, 1962, had become final and there was no right of appeal to the Court of Appeals in the defendants. Thus, pursuant to the provisions of 28 USCA 2107, there is no right of appeal from the Judgment of November 23 1962 and it had become final.

Although not so stating by moving to amend, the appellees have attempted to avail themselves of Rule 60, Federal Rules of Civil Procedure which is the only manner in which this action may now be reopened. Rule 60 does not apply for there are no facts that bring the case within its terms.

It is well settled that after the Judgment has become final, the Complaint may not be amended except as provided for by Rule 60, Federal Rules of Civil Procedure. However, Rule 60, *supra*, by its terms does not apply. In *T. S. C. Motor Freight Lines* v. *Leonard-Truck Lines*, 4 F.R.D. 366, 368, D.C., W. D. La., it was held:

> "In the present case the judgment was signed on November 27th and filed on the 29th whereas the proposed amendment was filed on December 29th, thirty days after 'entry' of the judgment. The time had passed therefore within which the parties could ask, or the court of its own motion could grant, a new trial, except for newly discovered evidence. The only remaining relief was by appeal, except as to clerical errors, etc. If the court was powerless to reopen issues upon which it had rendered final judgment, how could it entertain an amendment which, if allowed, would have the effect of setting at naught that judgment? The rules of Federal Procedure do not fix the time for perfecting appeals (this is still governed by Sec. 230 of 28 U.S.C.A.), except that rule 73 requires the filing of the transcript with the appellate court within forty days after the notice of appeal provided therein. That section, 230 of 28 U.S.C.A., declares that no appeal 'shall be allowed unless application therefor be duly made within three months after the entry of such judgment or decree.' To hold that plaintiff could amend its complaint on the ground attempted in this case within a period of thirty days would be to concede that it could also be done for the full three months, unless, in the meantime, an appeal

had been perfected, notwithstanding the provisions of Rule 59 limiting the time for entertaining motions for a new trial to ten days when not based upon newly discovered evidence.

"While the rules of civil procedure were intended to simplify the practice in the Federal courts by dispensing with unnecessary formalities and technicalities and to serve the ends of justice, rather than to thwart them, they nevertheless were bound to, and I think did, establish certain standards or limitations by which they could be expedited and, to that end, laid down the steps and periods within which thy should be taken, such as amendments, entry of judgments, filing of motions for new trials, taking and perfecting appeals, and which, if not timely followed, would preclude relief by those means, object only to the exceptions specifically named.

"My conclusion is that the attempted amendment in this case came too late and the plaintiff is relegated to an independent suit to recover the damages alleged for breach of the contract. The amendment will be denied."

In the present case, the diversity basis for jurisdiction was relied upon in the Complaint. With the right of appeal terminated, there is no right to amend the Complaint as the jurisdiction of the Trial Court has terminated. Plaintiffs' Motion to amend is not a Motion to conform to the evidence, and, thus, Rule 15b, Federal Rules of Civil Procedure, is not applicable. Certainly the amendment which sets up new issues under the Miller Act, and a new party plaintiff, namely the United States, is not proper because there was no

consent to try any of these issues. Amendment after judgment stating a new cause of action or a new defense is not permissible under the guise of conforming the pleadings to the proof. *Simms* v. *Andrews* (C.A. 10th), 118 F. 2d 803, 807. Furthermore, the right of appeal has been closed, and, thus, the Motion to amend after Judgment is improper because the Trial Court has lost jurisdiction. *Knox* v. *First Security Bank of Utah* (C.A. 10th), 206 F. 8d 823, 826

In *Kelly* v. *Delaware River Joint Commission*, 187 F. 2d 93, 94, cert. denied 342 U. S. 812, the same question was before the Court as to the right to amend after judgment under Rule 15(a):

> "The plaintiff points out that Rule 15 (a) on its face sets up no period of limitation. He takes the position that an amendment therefore may be effected under the rule at any time before the first responsive pleading. The defendants contend that no amendment under Rule 15 (a) is permissible after a final Judgment. An analogy is supplied by judgment for the defendant on a demurrer at common law where the plaintiff was not permitted to plead over and his suit was forever lost. The defendants endeavor to support this position on the ground that the Federal Rules of Civil Procedure have given such a wide range of weapons to a plaintiff that amendments may not be made after judgment except under Rules 59(e) and 60 (b). The plaintiff, as we have indicated, does not invoke these rules.
>
> "... He has filed a naked motion to amend. Since the plaintiff is not entitled to amend as a matter of right and since he has supplied no field

in which the court below properly could have exercised its discretionary power, the judgment will be affirmed."

The same position was taken in *Ricali Trucking Corp.* v. *New York Shipping Association*, 167 F. Supp. 943, 945 (C.D., N.Y.), wherein it was stated as follows:

> "While amendments are liberally granted in the federal court, I can find no basis for permitting an amended and supplemental pleadings in an action which has been dismissed more than a year ago by a judgment entered in this court, without the right of appeal ever having been exercised. United States v. Newbury Mfg. Co., 1 Cir., 1941, 123 F. 2d 453; Brill v. General Industries Enterprises, Inc., 3 Cir., 1956, 234 F. 2d 465; Kelly v. Delaware River Joint Commission, 3 Cir., 187 F. 2d 93, certiorari denied, 1951, 342 U. S. 812, 72 S. Ct. 25, 96 L. Ed. 614. This litigation has been terminated by the dismissal of the plaintiff's action and there is nothing pending in this district so as to permit plaintiff to restate or update its complaint. While there is no application for the exercise of my discretion pursuant to Fed. R. Civ. P. 60 (b) subdivisions (1), (2) or (3), 28 U.S.C.A., for an order setting aside the judgment entered on October 8, 1956, it is clear upon a reading of these sections that any application thereunder must be made within one year from the date of the entry of the judgment. Consequently, the motion, even if construed as a motion pursuant to Rule 60 (b) would be untimely."

Thus, with the termination of the case by final judgment with right of appeal lost, the Trial Court did not

have jurisdiction to permit an amendment to the Complaint to allege a new basis for jurisdiction.

Rule 15a, Federal Rules of Civil Procedure is alleged by plaintiffs to be the Rule they rely upon. However, Rule 15a clearly does not apply because by its own terms it does not apply to pleadings after judgment and trial, as it makes specific provision for responsive pleadings to make up the issues. After judgment, responsive pleadings are impotent as the trial is over. Thus, Rule 15a applies only to amendments before trial. 3 Moore Fed. Practice, Committee Note of 1937 (a), page 803; Section 15.08, page 827.

3. Should Rule 60, Federal Rules of Civil Procedure, be so construed as to permit the filing by the District Court of a Third Amended Complaint after final judgment, and after the District Court had lost jurisdiction except for the purposes set forth in Rule 60?

Rule 60, Federal Rules of Civil Procedure, is entitled "Relief from Judgment or Order." Pursuant to Rule 60b (4), the defendants properly filed their Motion for relief on the basis that the Judgment is void. However, the plaintiffs' position can not be sustained as to the filing of the Third Amended Complaint under Rule 60a or b, Federal Rules of Civil Procedure. Under examination of Rule 60b, Federal Rules of Civil Procedure, specific instances are required to give that Rule effect in order that action might be taken. The Motion to file the Third Amended Complaint after Judgment is not under one of these provisions. A final Judgment or its supporting record

may not be changed by the Trial Court unless permitted by Rule 60b as it has lost power as it has no jurisdiction. As stated in the Advisory Committee Note (28 U.S.C.A., Rule 6 c, page 311) the purpose of the amendment is to prevent reliance upon the continued existence of terms as a source of power to disturb the finality of a judgment on other grounds than those stated in these Rules.

Rule 60a, Federal Rules of Civil Procedure, applies to clerical mistakes, oversight and omission only while the appeal is pending from the Judgment or the Trial Court has jurisdiction. Secondly, there was no clerical mistake involved here nor was there an oversight or an omission. Jurisdiction was alleged on a diversity basis but not proven at the trial. In addition, diversity jurisdiction was not established as required by 28 USCA 1332. Thus, Rule 60a is not applicable under its very provisions where a new basis of jurisdiction is sought and no error or omission is created. Rule 15b, Federal Rules of Civil Procedure, is not applicable because the issues raised by the Amended Complaint were never tried, and there is no pretense made that the amendment is made for the purpose of conforming to the evidence. As a matter of fact, the plaintiffs had made such a motion to conform to the evidence and had submitted and filed their Second Amended Complaint (23a). See *T.S.C. Motor Freight Lines v. Leonard Truck Line, supra; Kelly v. Delaware River Joint Commission, supra; Rivoli Trucking Corp. v. New York Shipping Association, supra.* Thus, Rule 60 does not authorize the Trial Court's action.

4. Does 28 USCA 1653 authorize the filing of the Third Amended Complaint after final judgment and after the District Court has lost jurisdiction?

> "*Defective allegations* of jurisdiction may be amended, upon terms, *in the trial or appellate courts.*" (Emphasis ours.)

This statute is not applicable for the reason that the case is "not in the Trial or Appellate Courts." As to an action which terminated in the final judgment upon which no Notice of Appeal was filed, the action had terminated and jurisdiction is no longer in the Trial Court. Secondly, the action was not in the "Appellate Court" because no Notice of Appeal had been filed, and, therefore, the case did not rest in that Court.

It is reasonable and logical that once issues have been determined finally and no Notices of Appeal have been filed, the matter is concluded as to a money Judgment, and the validity of that Judgment must be examined at that time. In the present case, all Courts had lost jurisdiction of this Judgment for the purposes of modifying it and for the purpose of amending the Complaint. The only exception is Rule 60, Federal Rules of Civil Procedure and as we have shown, this Rule does not apply because there is no mistake in the Judgment nor is there any "oversight or omission."

In the allegations the Complaint and all of its amendments: Terry & Wright has never been sued pursuant to its obligations upon a bond. It has been sued consistently in all the Amendments to the Complaint on the basis of the construction contract between

Blanchard & Jenkins and Terry & Wright. No allegation is contained in any of the Complaints or Amendments that Terry & Wright is sued as a principal on the bond. Thus, clearly, the only basis for jurisdiction here involved as to Terry & Wright would be on diversity of citizenship. Thus, no jurisdiction ever existed.

As apparent in *Stern* v. *Beer* (C.A. 6th), 200 F. 2d 794, 795 quoted at page 795:

> ". . . Under the foregoing authorities, we are of the opinion that, if jurisdiction actually existed from the facts at the time when the complaint was filed, even though not properly pleaded, the proper construction of Section 1653, Title 28, U. S. Code, is that the formal defect in the pleadings did not deprive the Court of jurisdiction at the time when the action was filed, if such defect was later corrected."

Here, it is conceded that there is no diversity of jurisdiction at the time of the filing of the Complaint. The plaintiffs did not make a technical error, but there simply existed no jurisdiction. As stated in *Moore* v. *Coats Co.* (C.A. 3rd), 270 F. 2d 410, 411, the purpose of 28 USCA 1653 is "to permit amendment broadly to avoid the dismissal of suits on technical grounds." Here, a lack of diversity jurisdiction is actual and not technical. Here, the Miller Act allegations were omitted from the Complaint, and the "defective" allegation goes to diversity of citizenship in not alleging the principal place of business of the plaintiffs. Thus, 28 USCA 1653 does not cover this situation where the allegations are "omitted" and not "defective."

Since the allegations of the Amended Complaint as here filed do not correctly invoke the provisions of the Miller Act clearly as the necessary allegations under 40 USCA 270a and b are not present, the Court cannot be said to have had jurisdiction of the subject matter. Even under the Third Amended Complaint, Terry & Wright is not sued as a principal under the bond and it is not so alleged. Moreover, as will be shown in the next section, necessary jurisdictional allegations are not contained in the Third Amended Complaint. Not until such jurisdiction has been invoked and an action under the Miller Act commenced did the Trial Court have jurisdiction. As was pointed out by Mr. Justice Whittaker, the District Judge, in *In re Market Basket, Inc.*, 122 F. Supp. 321, 322 at page 322:

> "I am wholly without any jurisdiction to determine the merits of the controversy, because no action in respect of the matter has ever been commenced or is pending in this court. Rule 3 of Federal Rules of Civil Procedure, provides 'A civil action is commenced by filing a complaint with the court.'"

Thus, clearly, *28 USCA 1653* does not apply because there were no "defective allegations" since allegations were omitted. Secondly, since the judgment of the District Court was final and the case was not in any way in the Appellate Court for purposes of 28 USCA 1653, the case not not "in" the Trial Court or the Appellate Court at the time of the filing of the Third Amended Complaint. The filing of the

Motion by Terry & Wright under *Rule 60 b* (4), *Federal Rules of Civil Procedure*, on the ground that the judgment was void, did not reopen the matter for the filing of an Amended Complaint but presented to the District Court the question of whether the judgment was void as it had been finalized, and the District Court had no power or jurisdiction to change any of the facts or circumstances or to change the pleadings for it was before it on a limited question only as to whether the judgment was void.

5. Did the District Court properly allow the filing of the Third Amended Complaint when it added a new party plaintiff and when it failed to allege, pursuant to 40 USCA 270 b (b) that the suit had been commenced within one year after the final settlement of the contract obligations between Terry & Wright and the United States engineers?

Concerning Complaints filed under the Miller Act, 40 USCA 270 b (b) provides as follows:

> "Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere, irrespective of the amount in controversy in such suit, but no such suit shall be commenced after the expiration of one year after the date of final settlement of such contract. The United States shall not be liable for the payment of any costs or expenses of any such suit."

The Third Amended Complaint filed by the plaintiffs in paragraph 7 stated as follows:

"7. The date of final settlement of the contract between Plaintiffs and Terry & Wright, Inc., was not more than one year prior to December 11, 1959, the original commencement date of these proceedings."

The above allegation in the Third Amended Complaint obviously does not comply with the statute because what is required is the date of the settlement between the United States Engineers and Terry & Wright and not the date of the settlement between Blanchard & Jenkins and Terry & Wright. *Mandel v. U. S.* (C.A. 3rd), 4 F. 2d 629, 632. A well-settled rule of law that if an Amended Complaint, when tendered, does not state a cause of action, its filing should be refused. *Stephens v. Reed* (C.A. 3rd), 12 F. 2d 696, 699. Moreover, the Third Amended Complaint does not sue Terry & Wright as principals on the bond, but on the contract for work to be performed basically between Blanchard & Jenkins and Terry & Wright.

It is also clear that the allegations of the Third Amended Complaint raise new issues that were not tried. First, a new plaintiff was presented, namely the United States. Secondly, the question of whether the bond involved as far as the Federal Insurance Company was concerned, met the requirements of 40 U.S.C. 270 a. In addition, under paragraph 6, it raised the new issue of whether the plaintiffs had been paid in full prior to ninety days after the furnishing of the last labor and material. It further raised another issue under paragraph 7 as to whether the suit was commenced in time. None of these issues were

tried or presented in issue prior to the trial by the allegations contained in the first Complaint and the Second Amended Complaint. The defendants were accordingly denied the right to place these matters in issue. Thus, this is not a case where a trial has been had on the allegations alleged in the Third Amended Complaint required for jurisdiction.

United States Courts are Courts of limited jurisdiction and have held that it is necessary for the plaintiff to allege and prove his right to be in that Court. Such allegations were not contained in any of the Amended Complaints in a proper fashion.

Baglin v. Title Guaranty & Surety Co., 166 F. 356, affirmed C.A. 3rd, 178 F. 682, cited by the Trial Court, is not in point, for here the Court had not lost jurisdiction through a final judgment. *United States v. Barrett*, 135 F. 189, is not in point because the Act has been amended concerning where the suits must be brought. In addition, it has been held in later cases that the interest of the United States is not merely a formal one but that it has an interest in this type of loss to see that its suppliers are paid on public works projects. *U. S. for Use & Benefit of Browne & Bryan Lumber Co. v. Mass. Bonding*, 23 FRD 162; *Barnard-Curtiss Co. v. United States for the use and benefit of D. W. Falls Construction Co.* (C.A. 10th), 252 F. 2d 94, 95. *Burrell v. United States* (C.A. 9th), 147 F. 44, is not in point for the same reason, and it is to be noted that all of these cases relied on by the Trial Court were decided before the present amendments to the Miller Act.

New York Central R. R. Co. v. Kinney, 260 U. S. 340, where jurisdiction of the action was permitted to be changed from an action at common law to an action under the Federal Employers Liability Act by an amendment after the statute of limitations had run is not in point in the present case because the action was still pending in the United States Court. In other words, appeals and Writs of Certiorari had been granted from the Trial Court's Judgment, and there had been no loss of jurisdiction by the United States Courts. Here, such jurisdiction has been lost, except as to specific purposes, set forth in Rule 60, and in no statute or rule is such amendment permitted after all courts have lost jurisdiction for that purpose. The same principle and difference is true in *International Ladies' Garment Workers Union v. Donnelly Garment Co.* (C.A. 8th), 121 F. 2d 561, for there the case had been remanded by the Appellate Court to the Trial Court, and thus the case was still pending in either "the trial court or appellate courts" which is not the case here. Jurisdiction had not been lost by the Trial Court or the Appellate Courts in the *International Ladies' Garment Workers* case, *supra*, as it has been lost here. Moreover, the Trial Court, when the case was returned in 41 F. Supp. 65, granted a new trial because of new issues raised by the change in the bases for jurisdiction. The new trial was the "terms" under 28 USCA 1653. This was not done here by the Trial Court. *See Dollar S. S. Lines, Inc. v. Merz* (C.A. 9th), 68 F. 2d 594, 597.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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